

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

RAYMOND WILLIAM SCHMAL,

Plaintiff,

v.

Civ. No. 20-1324 JB/GJF

LUNA COUNTY, et al.,

Defendants.

**PROPOSED FINDINGS AND RECOMMENDED DISPOSITION
FOR COUNTY DEFENDANTS' MOTION TO DISMISS [ECF 19]**

THIS MATTER is before the Court on Defendants Luna County and Luna County Sheriff's Department's ("County Defendants") Motion to Dismiss Under Rule 12 [ECF 19] ("Motion"). Plaintiff has "fail[ed] ... to file and serve a response in opposition to [this Motion] within the time prescribed for doing so." D.N.M.LR-Civ. 7.1(b); *see* ECF 29 at 1-2 (County Defendants' notification that Plaintiff's response was due April 23, 2021; that no extension of this deadline was sought; and that briefing on this Motion was thus complete). Furthermore, Plaintiff's failure to respond "constitutes consent to grant the motion." D.N.M.LR-Civ. 7.1(b).

County Defendants assert that "'Luna County' and the 'Luna County Sheriff's Department' may not be sued under NMSA [New Mexico Statutes Annotated §] 4-46-1 and Federal Rule [of Civil Procedure] 17." Mot. 2-3. Consequently, County Defendants assert that "they must be dismissed from this suit with prejudice." *Id.* at 3.

The Court will recommend dismissing County Defendants with prejudice for the following reasons:

- (1) Plaintiff has consented to such a course of action. D.N.M.LR-Civ. 7.1(b).
- (2) "[P]ursuant to [Fed. R. Civ. P.] rule 17 and N.M. Stat. Ann. § 4-46-1, § 1983 claims against [Luna] County must be brought against the Board of County


Commissioners of the County of [Luna].” *Mayer v. Bernalillo Cty.*, No. CV 18-0666 JB\SCY, 2018 U.S. Dist. LEXIS 210839, 2018 WL 6594231, at *26-30 (D.N.M. Dec. 13, 2018).

(3) “[T]he [Luna] County Sheriff’s Department [is] not [a] suable entit[y] under § 1983.” *Stone v. Jefferson Cty. Det. Facility*, 838 Fed. App’x. 348, 350-51 (10th Cir. 2020) (unpublished) (citing *Martinez v. Winner*, 771 F.2d 424, 444 (10th Cir. 1985); *Tyus v. Martinez*, 475 U.S. 1138 (1986)).

IT IS THEREFORE RECOMMENDED that County Defendants’ Motion be **GRANTED** in that Luna County and Luna County Sheriff’s Department be **DISMISSED** from this suit **WITH PREJUDICE**.

IT IS FURTHER RECOMMENDED that this Court “permit[] [Plaintiff] leave to amend [his] Complaint to substitute the Board of County Commissioners of the County of [Luna] for [Luna] County.” *Mayer*, 2018 WL 6594231, at *30.

SO RECOMMENDED.


THE HONORABLE GREGORY J. FOURATT
UNITED STATES MAGISTRATE JUDGE

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1)(c). Any request for an extension must be filed in writing no later than seven days from the date of this filing. **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**